



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 26, 2022

IN THE MATTER OF:

Appeal Board No. 622733

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination, disqualifying the claimant from receiving benefits, effective November 4, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by INDEPENDENT LIVING prior to November 4, 2021, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed April 11, 2022 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as a network support professional for a residential group home. She has worked for the agency for over four years, is a union member, and works Thursday through Sunday, from 12:00 am until 8:00 am. The employer issued a written warning to the claimant on January 28, 2021, for inappropriate behavior, for her failure to call in absences and failure to report to work.

The claimant asked to work an additional shift, from 4:00 pm to 12:00 am, on November 3, 2021. Her employer added the claimant to the schedule. When the

claimant arrived at the group home for the extra shift, she noted that there were no clients at the residence. Soon after she arrived, one client returned for the evening. Another coworker, AH, was present and was assigned to pass out medications. The claimant was not happy that AH was assigned to pass out medications rather than her. The claimant went downstairs to see the schedule and noticed that the assistant residential supervisor had changed the schedule to allow AH to distribute medications.

The claimant went to speak with the assistant residential supervisor on duty to discuss the change. When the claimant pointed out that the assignments should only be changed in emergency situations the supervisor responded that scheduling changes were her prerogative, and she left. The claimant was upset by the change and uttered a vulgar statement.

Later, during that shift, the claimant telephoned the assistant residential supervisor. She loudly voiced her dissatisfaction with the schedule change, indicated that there was sufficient staffing in the house and stated that she should be allowed to leave. The assistant residential supervisor replied "ok". The conversation was overheard by the manager on duty and a client. The client asked the claimant not to leave. The manager did not tell the claimant she could not leave; she did not tell the claimant that she was abandoning her shift; nor did she indicate that the claimant was violating employer policy. The claimant left the premises. The client was upset that the claimant left. The claimant returned for her regularly scheduled shift at 12:00 am and she worked her full shift.

On November 4, 2021, the employer suspended the claimant with pay pending an investigation of her alleged abandonment of clients on November 3, 2021. The suspension with pay ran through December 7, 2021. On December 7, 2021, the employer discharged the claimant, effective December 30, 2021.

OPINION: The credible evidence establishes that the claimant left prior to the end of her shift on November 3, 2021. However, the record fails to establish that the claimant intentionally abandoned her shift when she left.

Although the employer contends that the claimant was on a final warning and that she knew, or should have known, that leaving when she did would jeopardize her employment, the contentions are not persuasive. We note that there was no specific employer policy as to early departures. And there is no evidence that the claimant would have known that she was on final warning, in

the absence of the actual written warning of January 28, 2021, and its contents.

We find it significant that on the claimant's final workday, when she stated to the assistant residential supervisor that she should be allowed to leave, and the supervisor responded "ok", indicating that claimant was being allowed to do so. The manager at the premises did not stop the claimant leaving by telling her that she could not leave or warning her that her job was in jeopardy for violating employer policy if she left.

Furthermore, we cannot conclude the claimant's "talking loudly" and her use of a vulgarity constituted misconduct. In so determining, we note that neither the assistant residential supervisor nor the manager on duty warned the claimant about raising her voice or using a vulgarity. Nor is there evidence that the claimant's use of the vulgarity was in front of a client or overheard by the client.

As a result, we find that the claimant's outburst, which was not directed at any one manager or a client, was an isolated instance of poor judgment. We have long held that poor judgment fails to rise to the level of misconduct. Accordingly, we conclude that, under these circumstances, the claimant was separated from her employment under non-disqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective November 4, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to November 4, 2021, cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER